

Nadler: Federal Court Decision Declaring NSA Wiretapping Illegal Underscores Need for a Special Counsel

Wednesday, 16 August 2006

WASHINGTON, D.C. – Congressman Jerrold Nadler, who is the Ranking Member on the Constitution Subcommittee of the Judiciary Committee, today renewed his call for the appointment of a special counsel to investigate President Bush's warrantless wiretapping program.

U.S. District Judge Anna Diggs Taylor declared that the program "violates the APA (Administrative Procedures Act); separation of powers doctrine; the First and Fourth amendments to the United States Constitution; and the statutory law." Furthermore, she wrote that "The President of the United States ... has undisputedly violated the Fourth in failing to procure judicial orders as required by FISA."

A statement by Rep. Nadler follows:

“It is clear that the warantless wiretapping program was a criminal violation of the law. As Judge Taylor wrote, “The President, undisputedly, has violated the provisions of FISA for a five-year period.” (ACLU v. NSA, pg. 36) The court could not have been more clear in dismissing the excuses offered by the administration for the last year. Therefore, those responsible for the NSA program, including the President and the Attorney General, must be held accountable. Normally, the Department of Justice could be expected to investigate and prosecute these criminal acts, but in a case involving the Attorney General and the President directly, the administration cannot investigate itself and we must again demand the appointment of a special counsel.”

“At the same time, we must vigorously pursue the terrorists and those who seek to do us harm. We must utilize existing laws and technology to tap terrorists's phones, to disrupt their plans, and to hold them responsible for the mayhem they seek to unleash on us. All of this can be done effectively and legally with the laws currently on the books, and I continue to support those in the FBI, NSA, and DOJ who work tirelessly every day to make America more secure.”

“But our pursuit of the terrorists does not excuse clear violations of the law by the President or anyone else in the Administration. No one is above the law.”

Just three weeks ago, Congressman Nadler renewed his demand to the Attorney General, first made last December, that he appoint a special counsel. Today his letter is even more relevant. The full text of Congressman Nadler's letter follows.

July 26, 2006

The Honorable Alberto Gonzales

Attorney General

Department of Justice

950 Pennsylvania Avenue NW

Washington, D.C. 20530

Dear Attorney General Gonzales:

I write to renew my demand that a special counsel be appointed to investigate the President's secret directive that authorizes domestic eavesdropping on United States citizens, without a warrant, by the National Security Agency (NSA). This unprecedented intelligence gathering policy is clearly prohibited by law.

You may recall that I first asked that a special prosecutor be appointed in a letter dated December 19, 2005. The Administration instead justified the actions of the President and others in the Administration in ordering the warrantless wiretaps in clear violation of the Foreign Intelligence Surveillance Act by claiming "inherent" Presidential power under Article II of the Constitution and by claiming that Congress implicitly authorized such action in the Authorization of the Use of Military Force (AUMF) resolution dated September, 2001.

The President's reliance on the same two sources of alleged authority to enable him to establish military tribunals to try Guantanamo detainees was specifically rejected by the Supreme Court in the Hamdan case. The Hamdan decision clearly eviscerates reliance on Article II "inherent" power or on the AUMF to justify the President's clear and obvious violations of the FISA Act in approving warrantless wiretaps of American citizens in the United States.

Therefore, the analysis in my December 19, 2005 letter would appear to be irrefutable, and places on you the unavoidable duty to appoint a special counsel. I, therefore, reiterate my demand that you appoint a special counsel to investigate and, if necessary, prosecute the President and other members of the Administration if it is found that they violated the Foreign Intelligence Surveillance Act (50 USCA §1809) which provides that a person who "engages in electronic surveillance under color of law [emphasis added] except as authorized by statute" is "guilty of an offense . . . punishable by a fine of not more than \$10,000 or imprisonment for not more than five years, or both."

FISA further states that:

"(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that — . . .

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is party;" (§1802)

No such certification has been acknowledged.

It is unconscionable that the President would authorize the NSA to spy on Americans without legal authority, in violation of the Constitution and of the law — and that he states brazenly that he will continue to do so. His refusal to accede to the warrant process — and, therefore, to the Fourth Amendment — is an affront to the Constitution and the American people.

Neither the President himself, nor anyone else in the White House, can authorize an order to spy on Americans without a warrant. Since the President stated that the Attorney General and the White House counsel were part of the decision to

initiate this eavesdropping, they cannot carry out an investigation.

The President and his Administration must be compelled to obey the law and to cease violating the President's Constitutional duty to "take care that the laws be faithfully executed";

I strongly urge you to appoint a special counsel to investigate these actions by the President and his associates. Only in this way can we hold the President and the Administration accountable and protect American liberties.

Sincerely,

Jerrold Nadler

Member of Congress

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